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In the
Supreme Court of the United States
OCTOBER TERM, 1974

No. 73-1910

RADIOCALL PAGING SERVICE,
Petitioner,

VERSUS

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, and ANSWERING, INC.,
Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, Answering, Inc., would show that Radio Call Paging Service's Petition for Writ of Certiorari to review the judgment of the Supreme Court of the State of Oklahoma should be denied.

JURISDICTION

Respondent would submit that no federal question is really involved in this matter, and that Petitioner's real position is the same as presented to the Supreme Court of Oklahoma, *i.e.*, that the Order of the Oklahoma Corporation Commission which is complained of, was granted without being supported by the evidence. From this, Petitioner suggests that his constitutional rights have been infringed. Respondent denies such suggestion.

QUESTION PRESENTED

1. Whether or not the Oklahoma Corporation Commission has jurisdiction to issue a Certificate of Convenience and Necessity for the Operation of radio paging service.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article IX, § 18 of the Oklahoma Constitution:

> "Powers and duties—Notice before taking action—Process for witnesses—Authority of Legislature—Municipal powers
>
> "The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications of traffic, and rules and regulations, and requirements, the Commission may, from time to time, alter or amend. * * * "

Title 17, §§ 201-205 printed in Appendix I to Petitioner's Brief (erroneously cited on page 3 of Petitioner's Brief as being Title 18 O.S. §§ 201-205, but correctly appearing in its Appendix).

STATEMENT OF THE CASE

This case arose in the Oklahoma Corporation Commission when Respondent filed an Application for a Certificate of Convenience and Necessity to operate a one-way radio paging service. Such Application was filed shortly after April of 1970, the date when the Oklahoma Legislature adopted the Act prescribing regulation of radio common carriers. 17 O.S. § 202 (See Appendix I of Petitioner's Brief).

Prior to filing the above referenced Application, the Respondent had filed an Application with the Federal Communications Commission for the issuance of a license for operating a one-way radio paging service on a newly allocated high band (guard band) radio channel. The F.C.C. had, shortly prior thereto, allocated two such channels for exclusive use in radio paging. Respondent has now been authorized to install equipment for the operation of one of such high band channels by the F.C.C.

The Petitioner is a radio common carrier operating a low band radio paging service. Petitioner is owned by Cyrus von Edwards, who operates under such assumed name.

After full hearing, the Oklahoma Corporation Commission granted a Certificate of Convenience and Necessity to the Respondent. The Petitioner appealed to the Oklahoma Supreme Court, which Court affirmed such decision in an opinion reported at 519 P.2d 1360.

In the Petitioner's appeal to the Oklahoma Supreme Court, he pleaded basically the same points of law as presented to this Court.

In rendering its Order granting the Certificate of Convenience and Necessity to the Respondent, the Oklahoma Corporation Commission determined in part as follows:

> "Evidence offered at the hearing showed that there is public need for one-way radio paging in Oklahoma City. The Commission is of the opinion that a telephone answering service offered in conjunction with one-way radio paging would be beneficial in serving this public need. The Commission further finds that no presently operating radio common carrier in Oklahoma City is currently offering this combination of telephone answering and radio paging and further, that no presently operating radio common carrier in Oklahoma City, Oklahoma, have, after opportunity to do so, offered the same or comparable service as that proposed by Applicant."

This Order was supported by ample testimony given by medical doctors, elevator service repairmen, as well as other repairmen, and a witness for a suburban fire department, all of whom testified that there was urgent need for a radio paging service to be operated in conjunction with a telephone answering service.

Although Petitioner contends in its Brief that a "great deal of evidence" was presented that Petitioner was fulfilling the needs of the public (page 4 of Petitioner's Brief), the truth of the matter is that the Petitioner only presented testimony from himself regarding this matter[1] and he admitted that, although he had been requested many times to add telephone answering service in conjunction with his radio paging service, he refused to offer answering service.

---

[1] Petitioner presented only one witness other than himself, which witness testified only to technical matters concerning radio paging equipment.

When questioned by the Chairman of this Commission in this regard, he made the following answers (Appeal Record No. 45156, page 232 filed with the Oklahoma Supreme Court):

> "CHAIRMAN NESBITT: You have no answering service in connection with Radiocall?
>
> "WITNESS EDWARDS: No, sir, I do not. We are licensed by the federal government as a one-way radio paging service to serve the community.
>
> "CHAIRMAN NESBITT: You said that. You don't contemplate any installation of any answering service?
>
> "WITNESS EDWARDS: No, sir, we do not propose to move over into their field."

Respondent submits that the Petitioner's case involves nothing more than a question of whether or not the Order of the Commission is supported by the evidence and that this Court should not be required to consider the matter. Petitioner alleges that his constitutional rights have been invaded, claiming that he should have the exclusive right to render one-way paging service, without regard to the rights of the public to be served in connection with their needs. We submit the following argument and authorities.

ARGUMENT AND AUTHORITIES

PROPOSITION I

THE OKLAHOMA CORPORATION COMMISSION PROPERLY EXERCISED ITS AUTHORITY IN GRANTING RESPONDENT A CERTIFICATE OF CONVENIENCE AND NECESSITY.

The Oklahoma Constitution at Article IX, Section 18 (quoted in part heretofore) grants the Oklahoma Corporation Commission power and authority to regulate and control all transmission companies; however, it was not until April 7, 1970 that the Legislature provided any statutes for regulation and control of radio common carriers, leaving the field exclusively to federal control. On that date, they adopted the Oklahoma Statute regarding regulation of radio common carriers, which appears at 17 O.S. §§ 201 through 205 (see Appendix I to Radiocall's Petition for Writ of Certiorari). Without this Statute, the Respondent was in no wise required to obtain a Certificate of Convenience and Necessity, and if this Court were to strike such Statute down, as Petitioner seems to require at page 5 of his Petition, then the appeal would be rendered moot because Respondent could operate as a radio common carrier in Oklahoma without any regulation.

The Respondent and one other Oklahoma company were the only timely applicants for a license from the Federal Communications Commission for the two high band radio paging channels set aside by the federal government for radio paging.

However, as we previously pointed out, although Petitioner would seem to require that the authority of the Okla-

homa Corporation Commission to regulate one-way radio paging be struck down, this would not serve his purpose for it would leave the Respondent free to operate in Oklahoma without any Certificate of Convenience and Necessity[2] and we believe that his real point is merely the weight of the evidence in support of the Commission Order. At page 6 of the Petition, Petitioner states:

> "The record is void of any evidence or testimony that the Petitioner or Mobilfone refused to furnish the service; in fact, both Petitioner and Mobilfone indicated in a positive sense that they can and will furnish the requisite radio paging service."

This statement of Petitioner is extremely misleading for the public need and convenience determined by the Commission was that the Oklahoma City public needed a paging service to be operated in conjunction with an answering service, and Petitioner not only does not render such service, but refuses to consider rendering the same. We quote from the Oklahoma Supreme Court Appeal Record, pages 231, 232:

> "Q. At Page 3 of your protest, I notice that you make this statement and I quote the second paragraph on that: 'Radio call paging service has been requested many times to add telephone answering service in conjunction with its radio paging station KJM-248, by subscribers and protective (prospective) subscribers. A good percentage of those making request were and are subscribers to An-

[2] In this regard see the letter attached as Appendix I written by the General Counsel of the Oklahoma Corporation Commission on May 19, 1969 setting out that no certificate was required. Such letter, of course, antedates the Oklahoma Radio Common Carrier Statute and would be the situation in Oklahoma if the statute was declared unconstitutional.

swering Service.' Did you make that statement? (Parenthesis added.)

A. That's very true.

Q. That's a true statement?

A. Yes, we've been requested to provide answering.

Q. Well, don't you feel like that the public is entitled to what it has a need and convenience for?

A. Well, we are not in the telephone answering business, actually. We are licensed by the federal government to run a radio paging station to serve the community and—

Q. And you want to frustrate these people who call you and tell you that they want radio and answering service at the same place and not to allow them to have it, is that right?

A. Well, there's other answering services in Oklahoma City that can serve them. Very good answering services, too.

Q. But you say that these people, many people, called you and told you that they wanted the same person to be giving their answering service that gives them their radio page.

A. Right.

Q. And you don't think that those people should be permitted to have what they need?

A. There are answering services here available to them. It doesn't have to be combined."

Following this, Chairman Nesbitt of the Oklahoma Corporation Commission wanted to make certain that there was no misunderstanding about the matter, and he made

the interrogation of Mr. Edwards, the owner of Radiocall which was heretofore quoted under Statement of the Case.

Evidence Supporting the Need for Certificate of Convenience and Necessity Issued to Respondent

Contrary to the Petitioner's position that the evidence did not support the Order of the Oklahoma Corporation Commission granting Respondent a Certificate of Convenience and Necessity (such Order appears in full as Appendix III to Radiocall's Petition for Writ of Certiorari), the evidence presented by the Respondent was overwhelming. It showed that it was a necessity to the medical profession that the Respondent's answering service be able to page doctors. See testimony of Doctors John V. Bumpus (Oklahoma Supreme Court Appeal Record, page 140, *et seq.*) and V. A. Crockett (Oklahoma Supreme Court Appeal Record, page 192, *et seq.*).

The evidence showed that it was a necessity to the various service people serving the needs of the City in matters such as elevators in hospitals and public buildings, Xerox copy equipment and other repair services. See the testimony of Edmond J. Angelil (Appeal Record, page 102, *et seq.*), Jack Pearson (Appeal Record, page 156, *et seq.*) and Larry Flesner (Appeal Record, page 165, *et seq.*).

The record further reflected that suburban fire departments required that Answering, Inc. have one-way paging service in order that such fire departments could properly function in rendering fire protection to the public. In this regard, see the testimony of Joseph B. Weems of the Ni-

coma Park Fire Department (Appeal Record, page 110, *et seq.*).

In arriving at the conclusion which the Oklahoma Corporation Commission made prior to its issuing its Order granting the Respondent the Certificate of Convenience and Necessity which is here under attack, Chairman Nesbitt of the Oklahoma Corporation Commission, on the record, propounded a question to the parties before it, and then made response thereto which showed the analysis of the public convenience and necessity that required the Order which was issued granting Respondent its Certificate. We quote from pages 246, 247, of the Oklahoma Supreme Court Appeal Record:

> "CHAIRMAN NESBITT: What if we decide there is room for only a part of one, for only limited purposes, isn't that a proper determination of public convenience and necessity? . . .
>
> * * * * * *
>
> "CHAIRMAN NESBITT: All right. The reason I asked the question, Mr. Verity, was that we have a rather novel situation herein. Of course, I think we all recognize that. Where primarily answering service was supplemented by a new service, high band paging service. Mobilfone[3] is primarily two way ground communication with a supplemental or subsidiary or whatever you call them, service of paging. Here we have a third type, the radiocall type paging service exclusively and desire at least to remain in that business exclusively and not with the answering service together, I mean, also. So, we don't have any direct competition and it makes it more difficult to determine what the need of

[3] A protestant at the Commission level who did not appeal.

> the public is, because we have this problem of using one service in the pre-existing service *which is not complete,* or using pre-existing service which is a little different type and whether the broader service that the applicant proposes conflicts with their existing services are of a little different type or sufficiently that the public convenience and necessity is met or not." (Emphasis supplied.)

Thus, we see that the constitutional rights of the Petitioner have not been infringed; that actually he wants, under the guise of constitutional protection, to have the law allow him to operate a low band one-way radio paging service without any competition, irrespective of the fact that he admits that his service does not meet the needs and demands of the public. The federal Constitution does not grant such rights to any citizen. The Oklahoma Corporation Commission had the power and authority, under the Constitution and Statutes heretofore cited, to grant Certificates of Convenience and Necessity. It also had the duty under the evidence in this case to grant the Certificate of Convenience and Necessity which it issued to the Respondent. The Petition of Radiocall Paging Service should be denied.

CONCLUSION

In conclusion, Respondent would submit that the constitutional rights of the Petitioner have in no wise been infringed; that his Petition merely repeats the contention which he made to the Oklahoma Supreme Court, arguing that he should be given exclusive radio paging license, irrespective of the needs and demand of the public for the

operation of a radio paging service in conjunction with answering service; and that his Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent,
Answering, Inc.

July, 1974

APPENDIX I

May 19, 1969

Mr. William A. Houser, President
Answering, Inc.
Suite 210, 100 Park Avenue Building
Oklahoma City, Oklahoma 73102

Dear Mr. Houser:

Your letter of May 14, 1969, addressed to Mr. J. W. Robertson of this Commission, has been given to me for answer.

Under the facts and circumstances mentioned in your letter, it is my opinion that it would not be necessary for you to be certificated and/or show proof of convenience and necessity to the Oklahoma Corporation Commission. Your letter indicates and I am advised that your operation is not and will not be compatible to a miscellaneous common carrier, nor will such operation give you the capability of communicating with land lines.

Based upon my information and again, your letter, it would be my opinion that the Federal Communication Commission has preempted this area and it alone would have jurisdiction over the radio frequencies which you desire.

If I may be of any further help or assistance to you, please let me hear from you.

Very truly yours,

JAS:jb

Jack A. Swidensky
General Counsel

cc:

Mr. Howard K. Berry Jr.
Berry, Hammer & Berry
Suite 625-626 Cravens Building
Oklahoma City, Oklahoma 73102

[This letter is Exhibit 19 from the Appeal Record]

CERTIFICATE OF SERVICE

I, the undersigned, GEO. L. VERITY, attorney for the Respondent, ANSWERING, INC., do hereby certify that I have mailed three (3) copies of the foregoing Brief in response to the Petition for Writ of Certiorari in accord with the requirement of paragraph 1 of Rule 33 to Counsel of record for the Petitioner at the following address:

Mr. Stephen Jones
Jones, Williams, Bane, Ray & Klingenberg
525 Fidelity Plaza
Oklahoma City, Oklahoma 73102

I further certify that these Rules require service only on the above named attorney.

GEO. L. VERITY